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No. 85-854

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In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANK RUDOLPH ESPOSITO AND
RICHARD PIEKARSKI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the indictment properly stated an offense under the Travel Act, 18 U.S.C. 1952.

2. Whether there was a variance between the indictment and the proof at trial.

3. Whether petitioners were entitled to dismissal of the indictment under the "spoliation" doctrine.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 771 F.2d 283.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1985. A petition for rehearing was denied on September 18, 1985 (Pet. App. A-13). The petition for a writ of certiorari was filed on November 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner Esposito was convicted on seven counts of attempting to interfere with interstate commerce by extortion, in violation of the

Hobbs Act (18 U.S.C. 1951), and on four counts of interstate travel in furtherance of that offense, in violation of the Travel Act (18 U.S.C. 1952). Petitioner Piekarski was convicted on five Hobbs Act counts and on one Travel Act count. Each petitioner was sentenced to a total of 25 years' imprisonment.[1] The court of appeals affirmed (Pet. App. A1-A12).

The evidence at trial showed that in April 1983 petitioners traveled from Illinois to Indiana and attempted to extort from Timothy Janowsky half the profits generated by his vending and game machine business. Janowsky's business (Geno's Vending) supplied and serviced coin-operated vending and game machines in Northwest Indiana. On April 6, 1983, Janowsky met petitioners at a Merrillville, Indiana restaurant, and Piekarski demanded 50% of Janowsky's profits from Geno's Vending. Janowsky was warned that Piekarski was from "the main store" and that he was to make Piekarski a "50-50 partner" or be put "out of business" (4 Tr. 33-38; GX 31).[2]

Two days later, the men again met at the restaurant, this time under FBI surveillance. Piekarski repeated the threat that Janowsky either make petitioners "partners" or he "was out of business." Piekarski also asked for a list of businesses where Geno's Vending poker machines were located (4 Tr. 50-52; GX 32), and in the next ten days Esposito visited Geno's Vending three times seeking the list. During these visits, Esposito told Janowsky that "half a loaf

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[1]Concurrent 20-year terms were imposed on the Hobbs Act counts, and concurrent five-year terms on the Travel Act counts, to be served consecutively to the sentences imposed on the Hobbs Act counts (Pet. App. A1). Two other defendants were acquitted by the jury.

[2]This conversation, as well as subsequent conversations between Janowsky and petitioners on April 8, 11, 14, 19, 27 and 28, were recorded by a device concealed on Janowsky.

of bread is better than none," and threatened Janowsky's home and family (4 Tr. 73-74).

At a meeting on April 19, Piekarski told Janowsky that "there was no room for negotiating and that they were 50-50 partners come the end of the month" or else Janowsky would be "out of commission" (GX 37). About a week later, Esposito telephoned Janowsky, stating that he would pick up the money at the end of the month (GX 36). The next day, Janowsky was called again, this time by Piekarski, and directed once more to turn the money over at the end of the month (*ibid.*). Petitioners were arrested shortly after this call.

ARGUMENT

1. Petitioners contend (Pet. 9-12) that their Travel Act convictions should be reversed because, although the proof was entirely sufficient, the counts that charged those offenses failed to allege an essential element: an attempt to extort money that followed interstate travel.

We note at the outset that petitioners did not challenge the sufficiency of the Travel Act counts in the district court (Pet. App. A10). Questions of waiver aside, the failure to raise the claim required the court of appeals to "construe the indictment liberally and * * * not reverse unless [the challenged counts] cannot within reason be construed to charge a crime." *United States* v. *Cauble*, 706 F.2d 1322, 1333 n.25 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). Accord, *Hagner* v. *United States*, 285 U.S. 427, 433 (1932) ("[u]pon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment").[3] As Professor Wright observes (1 C. Wright,

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[3]See also *United States* v. *Chilcote*, 724 F.2d 1498, 1504-1505 (11th Cir. 1984), cert. denied, No. 83-6624 (May 29, 1984) (because the defendant failed to object to the indictment below, the court of appeals

Federal Practice and Procedure § 125, at 365-366 (1982)): "The fundamental purpose of the pleading is to inform the defendant of the charge so that he may prepare his defense, and the test for sufficiency ought to be whether it is fair to [the] defendant to require him to defend on the basis of the charge as stated in the * * * indictment * * *. The * * * requirement that every ingredient or essential element of the offense should be alleged must be read in light of the fairness test just suggested." Similarly, "[t]his Court has in recent years, upheld many convictions in the face of questions concerning the sufficiency of the charging papers. Convictions are no longer reversed because of minor and technical deficiencies which did not prejudice the accused." *Smith* v. *United States*, 360 U.S. 1, 9 (1959).

Under these standards, the court of appeals correctly sustained the Travel Act convictions. Although, as the court acknowledged (Pet. App. A10), the Travel Act counts, "standing alone," failed to charge an essential element of the offense, "[t]he missing elements of attempts to extort occurring after the interstate travel were included in other counts in the same indictment" (*id.* at A11). Moreover, as the court observed (*id.* at A10), "[i]t is clear that when the indictment is read as a whole it gave [petitioners] notice that they were charged with attempts to extort, necessarily included within attempts to affect commerce by extortion [specified in the Hobbs Act counts], on dates later than, as well as the same

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"must find the indictment sufficient 'unless it is so defective that it does not, by any reasonable construction, charge an offense for which the defendant is convicted' " (quoting *United States* v. *Trollinger*, 415 F.2d 527, 528 (5th Cir. 1969)). See also *Dunbar* v. *United States*, 156 U.S. 185, 190 (1895) ("the entire indictment is to be considered in determining whether the offence is fully stated"); *United States* v. *Christopher*, 700 F.2d 1253, 1257 (9th Cir.), cert. denied, 461 U.S. 960 (1983) ("An indictment should be read in its entirety, construed according to common sense and interpreted to include acts which are necessarily implied.").

as, the dates of interstate travel." Indeed, petitioners, who rely solely on a technical argument, do not contend that the indictment provided insufficient notice of the Travel Act charges. Nor is there any dispute that petitioners' Travel Act convictions were based on instructions that required the jury to find every element of the offense before it could convict (see Pet. App. A10-A11). In these circumstances, the indictment satisfied all " 'notice' related concerns" (*United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985), slip op. 5). Accordingly, as the court of appeals concluded (Pet. App. A11): "[V]acating the convictions and ordering these counts dismissed would be an extreme example of technicality, unnecessary to protect the rights of [petitioners]. * * * Reindictment and retrial * * * here, necessarily including proving again the attempts to extort which followed the instances of interstate travel, would be a pure waste of energy because [petitioners] would not thereby be afforded any protection of their rights which was not afforded in the first trial." See *United States* v. *Hasting*, 461 U.S. 499, 509 (1983) ("it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations").

There is likewise no occasion for this Court to review the alleged conflict between the opinion below and the Third Circuit's decision in *United States* v. *Wander*, 601 F.2d 1251, 1259 (1979). In that case, the Third Circuit dismissed Travel Act counts for failing to allege the same element missing from the instant counts—*i.e.*, an act in furtherance of the unlawful activity occurring subsequent to the interstate travel. Without questioning the soundness or continued vitality of *Wander*, the court below expressly distinguished the two cases on their facts, explaining (Pet. App. A11) that the Third Circuit did not indicate whether the indictment at issue there made any reference to the omitted elements, whereas in the instant case "the elements missing

from the Travel Act counts were charged in other counts, and must have been found by the jury," which convicted on those other counts.[4]

2. Petitioners also contend (Pet. 12-14) that there was a variance between the indictment's allegation that they demanded 50% of the profits Geno's Vending derived from electronic games and amusement machines and the evidence that the extortionate demands were for 50% of the profits generated by electronic poker machines used for gambling. In addition, they argue that the indictment alleged that Geno's Vending was the "victim" of the attempted extortion, whereas the proof showed a different victim, *i.e.*, Janowsky. The court of appeals correctly concluded (Pet. App. A2-A4) that the contention of a variance is frivolous.[5] It surely does not warrant this this Court's attention.

3. Finally, petitioners claim (Pet. 15-16) that the doctrine of "spoliation" mandates reversal of their convictions because the extortion victim (Janowsky) destroyed Geno's

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[4]In *United States* v. *Hayes*, 775 F.2d 1279 (4th Cir. 1985), the court of appeals reversed a Travel Act conviction where the indictment omitted the same element at issue here. The court ruled that the indictment " 'fail[ed] to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction' " (775 F.2d at 1282-1283, quoting *Russell* v. *United States*, 369 U.S. 749, 768 (1962). The instant case is distinguishable from *Hayes* because, as the court below explained (Pet. App. A10), petitioners' indictment read as a whole expressly identified the alleged conduct charged in each count.

[5]With respect to the alleged variance concerning the object of the extortion, the court noted (Pet. App. A2) that "[t]here was testimony that electronic poker machines are amusement machines" and that view is consistent with the "ordinary meanings" of the words. Likewise, insofar as relevant to this case, there was no significant distinction between Geno's Vending, a related enterprise (Blackbeard's Arcade), and Janowsky, who owned and operated both businesses (Pet. App. A3).

Vending poker machine records.[6] As the court of appeals observed (Pet. App. A5), the poker machine records were irrelevant to any issue at trial because "it made no significant difference whether the poker machine proceeds were accounted for in the ordinary course of bookkeeping of Geno's Vending, or separately received and recorded by Janowsky." In any event, as the court of appeals concluded (*ibid.*), the spoliation doctrine applies only where a *party*, not a mere witness, destroys evidence *in bad faith*, and there is no suggestion here that Janowsky was motivated by such animus or that the government participated in or condoned his destruction of the records.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]Janowsky testified that he destroyed those records after he was first approached by petitioners (Pet. App. A4).